

RRC STAFF OPINION

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: NC STATE HEARING AID DEALERS AND FITTERS BOARD

RULE CITATION: 21 NCAC 22A .0503

RECOMMENDED ACTION:

Return the rule to the agency for failure to comply with the Administrative Procedure Act

Approve, but note staff's comment

X Object, based on:

Lack of statutory authority

X Unclear or ambiguous

Unnecessary

Failure to adopt the rule in accordance with the APA

Extend the period of review

COMMENT:

In (b) the rule is vague in setting out the deadline for an applicant to supplement and complete an application before it is denied or considered "abandoned by the applicant". While I might like to argue that the rule is also vague in that it does not specify whether the board will notify the applicant as to how the application is incomplete, unless they actually do notify someone, then I suppose there is no ambiguity in that respect.

The rule states that the board "shall deny the application after ten business days" but it does not state when the count for the 10 days begins. One would think that it would be 10 days after receipt of the application, but since the board can take action only at a meeting of the board, the day the application is received cannot be the date the countdown starts since it's inconceivable that in all these cases the board would be meeting 10 days later. If it is 10 days "or more" that the board would act, that is not clear. It is also not clear that if it actually is board action, which requires a board meeting, to deny the application whether the application will be denied if the supplemental application information is submitted more than 10 days after the deadline but before the board meeting and action.

I suspect the real problem with this rule is that it is not articulating the actual policies and procedures of the board, not vagueness in the rule about what actions the board and

staff carry out. For that reason I have requested a technical change to bring this rule in line with what is the actual procedure the board follows.

There is another, perhaps more serious, problem in (c). In line 35 the rule states that an untimely application "is grounds for denying an applicant admission to an examination." I would understand "is grounds for denying" to be discretionary and not require denial. At least it certainly leaves an opening for an argument since it would be easy enough to write the rule clearly barring admission to the exam when the application is late. (This might be another case where if the board has consistently denied admission to late applicants and not granted exceptions, it might be acceptable to allow a technical change to the rule.)

Finally in (c) if it is not automatic the rule is also unclear as to what standards will be used to decide whether or not to grant exam admission to an applicant who is late submitting a completed application.

In (f) line 44 the rule states that an applicant's failure to submit an application by the "application deadline" is grounds for the board to deny the application. First it is not clear what the "application deadline" is. There is a deadline to submit an application in time to be able to sit for the next exam. But that does not necessarily mean that is the same deadline to submit a complete application or have your application denied.

In addition to that and for the same reasons set out above pertaining to "grounds for denying" in paragraph (c), the term is ambiguous here as well. It is ambiguous both as to whether the decision is discretionary and if it is discretionary what standards will be used to make the decision.